

BEST AVAILABLE COPY

Office - Supreme Court, U.S.

FILED

AUG 22 1984

ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-121

3

ZARKO SEKEREZ,

Petitioner,

VS.

**INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA**

**BRIEF FOR RESPONDENT INDIANA SUPREME
COURT DISCIPLINARY COMMISSION
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

**Sheldon A. Breskow
David B. Hughes
Indiana Supreme Court
Disciplinary Commission
814 I.S.T.A. Building
150 West Market Street
Indianapolis, Indiana 46204**

Attorneys for Respondent
**Indiana Supreme Court
Disciplinary Commission**

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-121

ZARKO SEKEREZ,

Petitioner,

vs.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

I.

OPINION BELOW

The decision and opinion giving rise to Petitioner's application for a Writ of Certiorari was made and entered by the Supreme Court of Indiana on January 18, 1984. While said decision and opinion are not yet officially published and reported in the Indiana Reports, the same appears at 458 N.E.2d 229, entitled *In The Matter of Zarko Sekerez*. The decision and opinion is set forth in Petitioner's Appendix at App 1-27. The effect of the subject decision

and opinion was to disbar Petitioner from the practice of law in the State of Indiana.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

III.

QUESTIONS PRESENTED

The Respondent will respond below in its Argument to both of the questions presented in the petition.

IV.

CONSTITUTIONAL PROVISION AND STATE RULE INVOLVED

The Petitioner has fairly summarized the constitutional provision and state rule he claims have application to the questions presented.

V.

STATEMENT OF THE CASE

On August 29, 1980, a seven-count Verified Complaint For Disciplinary Action was filed against the Petitioner by Respondent. A Hearing Officer was appointed by the Supreme Court of Indiana and the cause was heard at a week-long evidentiary hearing commencing on August 24, 1981. The Hearing Officer filed his report to the Supreme Court of Indiana on May 17, 1982, pursuant to Admission and Discipline Rule 23, Section 14(f). In said report, the Hearing Officer found that Petitioner had committed the acts of misconduct alleged in each of the seven counts of the Verified Complaint.

A review by the Supreme Court of Indiana of the findings and conclusions contained in the Hearing Officer's Report

is provided for in Admission and Discipline Rule 23, Section 15(a). Petitioner petitioned for a review of certain factual findings of the Hearing Officer on July 19, 1982. However, Petitioner did not comply with the mandate of Admission and Discipline Rule 23, Section 15(c) in that he failed to provide a record of all evidence before the Hearing Officer as to the contested findings. Absent a sufficient record to support Petitioner's challenges to certain factual findings made by the Hearing Officer, the Supreme Court of Indiana accepted the Hearing Officer's Findings of Fact and limited its review in the matter to the conclusions reached by the Hearing Officer and to Petitioner's constitutional challenges to certain disciplinary rules that Petitioner was found to have violated.

The result of the Court's review was that two (2) of the seven counts were dismissed. As to the remaining five (5) counts, the Court found that the Petitioner had violated the **Code of Professional Responsibility for Attorneys at Law** to such extent as to warrant disbarment. Disbarment was ordered in the Court's opinion entered on January 18, 1984.

On February 27, 1984, Petitioner filed the following post-judgment motions: "Motion To Stay The Enforcement Of The Order Entered Herein On January 18, 1984"; "Petition For Rehearing"; "Amended Motion To Stay The Enforcement Of The Order Entered Hereon On January 18, 1984"; "Motion For Leave To Appear *Pro Haec Vice* And To Appear As Additional Counsel"; "Motion For Leave To Supplement Record"; and "Amendment To Motion For Leave To Supplement Record". All motions were denied by the Indiana Supreme Court on April 23, 1984.

VI.
REASONS FOR DENYING THE WRIT

I. Petitioner's First Question For Review Does Not Present A Justiciable Issue To Invoke This Court's Writ of Certiorari

Petitioner seeks to have this Court issue its extraordinary Writ of Certiorari to decide the question of what standard of proof is constitutionally required in attorney discipline matters. Petitioner then argues, in pages 29 through 46 of his Petition, for the very standard that the Indiana Supreme Court had previously adopted, and in fact applied in Petitioner's case below. We quote from the record below as it appears in Petitioner's Appendix at App 6 and 7:

As a final preliminary matter, we note that the Respondent also urges, in a single sentence, that Admission and Discipline Rule 23, Section 14(f), which provides for the "preponderance of evidence" standard of proof for disciplinary cases, is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The Respondent makes no attempt to substantiate this contention. However, in the recent case of *In re Moore*, (1983) Ind., 453 N.E.2d 971, this Court re-examined the standard of proof applicable to these cases and determined that the "clear and convincing" standard of proof more reasonably conforms to our analysis of the nature of the disciplinary process and follows the weight of authority. Accordingly, we will review the evidence in this case under a "clear and convincing" standard.

Therefore, it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review based upon the facts of this case.

II. The Indiana Supreme Court's Application And Interpretation Of Admission And Discipline Rule 23, Section 15(c), Did Not Violate Petitioner's Due Process Rights

Petitioner seeks to draw into issue the Supreme Court of Indiana's Admission and Discipline Rule 23, Section 15(c), which reads in pertinent part as follows:

(c) In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

Petitioner's argument is two-fold: First, that the rule is fatally vague; second, that the court interpreted the rule in a way which invited the conduct of Petitioner which the court later held to be insufficient. Neither proposition is well taken.

The rule is clear and unambiguous in its mandate that the party contesting a factual finding made by the hearing officer shall file with the petition for review a "...record of all evidence before the hearing officer relating to this factual issue". In his response to the clear mandate of the rule, the Petitioner filed only a partial record consisting of the testimony of his witnesses.

Petitioner contends that the second sentence of the above quoted rule led to his confusion as to the requirement contained in the first sentence. Petitioner's position is that because the second sentence of the rule provides that opposing parties may file such additional transcript as is deemed necessary to resolve the issue, the Petitioner "...is to supply what he believes to be all the necessary evidence..." (Petitioner's Argument, p. 22 in the Petition). Petitioner's

interpretation of the rule has no support in logic. The possibility that the opposing party may deem that additional transcript is necessary to resolve the issue in question does not negate the petitioning party's obligation under the rule. The first sentence states what the petitioning party "shall" do; the second sentence states what the opposing party "may" do. Therefore, Petitioner's contention that the language of the rule is fatally vague is not founded in fact or supported by logic.

The second argument Petitioner makes regarding Admission and Discipline Rule 23, Section 15(c) is that the Supreme Court of Indiana interpreted the rule in such a way as to invite Petitioner's conduct in supplying only a partial record in his petition for review, and subsequently foreclosed Petitioner's opportunity for a review of the findings. Petitioner seeks to draw support for this position from an order issued by the Supreme Court of Indiana on October 25, 1982, whereby the court denied the Disciplinary Commission's request that the court compel Petitioner to file a record of all the evidence before the hearing officer relating to the contested issues. The court denied the Commission's request in the subject order. The order appears in Petitioner's Appendix C at App. 34.

The above argument fails for two reasons. First, the order that Petitioner claims misled him was issued **after** the Petitioner had filed his petition for review of the Hearing Officer's findings. The Petitioner filed for review on July 19, 1982, and the court issued the subject order on October 25, 1982. Therefore, Petitioner's contention that he relied on the court's order is untenable.

Second, notwithstanding the above analysis, a reference to the last sentence of the second paragraph of the subject order will reveal that the Petitioner was on notice that the record submitted with his petition for review was not sufficient. The referenced sentence reads as follows:

If the record submitted is insufficient, the petitioning

party must stand on it; if the petitioning party attempts to practice obfuscation, he must accept the consequences.

Petitioner failed to heed the court's warning, ignored its admonition, and did not seek to supplement the record until February 27, 1984.

The Supreme Court of Indiana's recognition of the fact that the Petitioner had failed to follow the mandate of a rule that provides a party with the opportunity for a review of contested findings cannot be accurately characterized as "... a rather harsh procedural sleight-of-hand..." (pg. 46 of the Petition).

Notwithstanding the rule's clear directive that the party wishing to contest a factual finding of a hearing officer must file a record of all the evidence before the hearing officer relating to that issue, and, notwithstanding the language of the court in its order of October 25, 1982, whereby the court characterized Petitioner's efforts as an "attempt to practice obfuscation", the Petitioner did not seek to supplement the record until February 27, 1984, more than five (5) weeks after the court had issued its final order disbarring Petitioner.

Therefore, it is respectfully submitted that the Supreme Court of Indiana's application and interpretation of Admission and Discipline Rule 23, Section 15(c) comports with the Due Process requirements of the Fourteenth Amendment to the Constitution.

CONCLUSION

The decision below is correct. For the foregoing reasons, it is respectfully submitted that this Petition For Writ of Certiorari should be denied.

Respectfully submitted,

/S/ SHELTON A. BRESKOW
SHELTON A. BRESKOW

/S/ DAVID B. HUGHES
DAVID B. HUGHES

Attorneys for Respondent
Indiana Supreme Court
Disciplinary Commission
814 I.S.T.A. Building
150 West Market Street
Indianapolis, Indiana 46204
Telephone: 317-232-1807